Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1701

DR. DON M. SMART,

Petitioner,

v.

TEXAS POWER & LIGHT COMPANY, et. al.,

Respondents.

RESPONDENT TEXAS POWER & LIGHT COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RESPONDENT TEXAS POWER & LIGHT COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent prays this Honorable Court to deny the Petition for a Writ of Certiorari for the reason that the judgment below is correct, just, and supported by an unbroken legion of decided cases in point including cases heretofore decided by this Honorable Court.

PREFACE

The Petition for Writ of Certiorari is yet another chapter in a tome of harassing, vexatious and frivolous attempts (first commenced over twenty years ago in 1955) by Petitioner or his attorney to burden the courts with their disagreement with the

philosophy that public service corporations have properly been granted by the State the power to take private property for a public purpose upon the payment of just compensation.

In 1955, Petitioner's attorney, S. L. Lewis, challenged the authority of Texas Power & Light Company, Respondent herein, to survey his land preparatory to its filing a condemnation action. The Texas Court of Civil Appeals affirmed an injunction granted by the trial court restraining Lewis from interfering with the survey. *Lewis v. Texas Power & Light Company,* 276 S.W.2d 950 (Tex.Civ.App. 1955, *error ref'd., n.r.e.)*

During the pendency in the state courts of the Lewis condemnation suit, referred to above and involving the same tract of land, S. L. Lewis, on behalf of his sister, brought an action in the United States District Court against Texas Power & Light Company and its parent company challenging the validity of the Texas condemnation laws. The 5th Circuit affirmed the trial court's dismissal of the action. *Baber v. Texas Utilities Company, et al* (D.C.Tex.1955) 128 F.Supp. 753, affd., 5 Cir., 228 F.2d 665 (1956).

In 1972, Petitioner's attorney, S. L. Lewis, instituted an action in the United States District Court against Texas Power & Light Company, its parent and associated companies, and substantially all other electric and gas utility companies in Texas, again attacking the validity of the Texas condemnation laws. The 5th Circuit affirmed the trial court's dismissal of the action. *Lewis v. Texas Power & Light Company, et al,* 5 Cir., 462 F.2d 1318 (1972).

While the above case, *Lewis v. Texas Power & Light Company,* was pending in the 5th Circuit and before its decision,

Lewis filed in the U.S. Supreme Court his petition for Writ of Mandamus and in the alternative for Writ of Certiorari against the Chief Judge of the 5th Circuit and the trial Judge, seeking reinstatement of the case on the trial docket. This Court denied the motion. *Lewis v. John R. Brown, Chief Judge, et al,* 404 U.S. 819, 92 S.Ct. 74, 30 L.Ed.2d 119 (1971).

In 1972, Don Smart, represented by the same S. L. Lewis who instigated the previous actions, brought the instant suit against Texas Power & Light Company and the Governor and Attorney General of Texas, again alleging the invalidity of the Texas condemnation laws in regard to a condemnation suit filed in Collin County, Texas, in 1970. The action of the trial court in dismissing the action was affirmed by the 5th Circuit. *Don Smart v. Texas Power & Light Company, et al,* 5 Cir., 525 F.2d 1209 (1976). From such action, plaintiff now seeks Writ of Certiorari from this Court.

Later in 1972, Nancy Gayle Smart, wife of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against the Dallas County Sheriff and his deputies, the Dallas County District Attorney, the Dallas County Criminal Judge and the Rockwall County District Judge in whose court a 1972 Don Smart condemnation proceeding was pending, alleging false arrest in connection with Smart's allegedly interfering with service of process in the condemnation proceedings. The 5th Circuit affirmed a judgment against the plaintiff. *Nancy Gayle Smart v. Jones,* 5 Cir., 493 F.2d 663 (1974), reh.den. 495 F.2d 1372. This Court denied petition for Writ of Certiorari, 419 U.S. 1090, 95 S.Ct. 681, 42 L.Ed.2d 682

(1974), and denied petition for rehearing, 420 U.S. 939, 95 S.Ct. 1151, 43 L.Ed.2d 417 (1975).

In 1973, Don Smart, represented by S. L. Lewis, brought a civil rights action in the U.S. District Court against the Dallas County Sheriff and his deputies, the District Attorney and his assistants, and Texas Power & Light Company and its president and its attorney, alleging the invalidity of the Texas condemnation laws and false arrest arising out of Smart's allegedly interfering with the service of process upon him in the condemnation suit involved in the instant controversy in which he has petitioned this Court for a Writ of Certiorari. The trial court granted defendant's motion for summary judgment, and upon plaintiff's appeal, the 5th Circuit affirrmed. *Don Smart v. Jones, et al,* 5 Cir., 530 F.2d 64 (1976).

In 1974, Scott Smart, the brother of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against Texas Power & Light Company and its attorney and the District Judge of Collin County, Texas, in which the instant Don Smart condemnation suit is pending, alleging the invalidity of the Texas condemnation laws and that the Collin County proceedings were void because of his non-joinder as a party. This Scott Smart suit involves the same condemnation involved in the case at bar. The trial court dismissed the action because of Scott Smart's lack of standing by reason of his claim under a conveyance which was unrecorded until 2½ years after commencement of the Collin County proceedings. The 5th Circuit affirmed the dismissal. *Scott Smart v. Texas Power & Light Company, et al,* 5 Cir., 525 F.2d 1211 (1976). Scott Smart has recently petitioned this Court for a Writ of Certiorari.

Later in 1974, Nancy Gayle Smart, wife of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against Texas Power & Light Company and its president and attorney, alleging the invalidity of the Texas condemnation laws and deprivation of her constitutional rights, said action being based upon the same facts and occurrence as she had alleged in her previous action against the Dallas County Sheriff, et al. Defendants' motion to dismiss this action on the ground of *res judicata* and collateral estoppel is pending in the trial court. *Nancy Gayle Smart v. Texas Power & Light Company, et al,* No. CA3-74-870-F in the U.S. District Court for the Northern District of Texas, Dallas Division.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" is an unsupportable legal argument rather than a statement of the "facts material to the consideration of the questions presented" as required by U.S. Sup. Ct. Rule 23(e). Moreover, most of the alleged "factual" statements are completely *de hors* the record and were not even mentioned in any of the briefs or motions filed by Petitioner in the Court of Appeals. For example, neither Dr. Scott Smart nor J. E. Abernathy were mentioned in Petitioner's appeal to the Fifth Circuit and there is absolutely no summary judgment evidence in this case concerning either of these two gentlemen except the signature of Mr. Abernathy to the Petition filed on behalf of Respondent in the state condemnation proceeding (R., p.135). While entirely *de hors* the record and completely immaterial, Mr. Abernathy did at one time represent Don Smart's predecessors-in-title to the land in question but he did not represent Don Smart or his brother, Scott Smart.

Furthermore, notwithstanding Petitioner's bald assertion to the contrary, the condemnation was properly authorized by Respondent's Board of Directors (See, *e.g.*, Deposition of T. L. Austin, Jr., pp. 11-12, 15, 25-26, 62-68, and R., pp. 223-229).

Respondent will defer answering the legal arguments contained in Petitioner's "Statement of the Case" to the section entitled "Reasons for Denying a Writ," *infra*. The facts material herein are as follows:

This suit was instituted by Smart on August 25, 1972, seeking, *inter alia*, to enjoin Respondent from exercising any right under the Texas condemnation laws over his property and for a declaratory judgment declaring the invalidity of the Texas condemnation laws (R., pp.1-13). On September 1, 1970, almost two years before the instant action was begun, Respondent instituted condemnation proceedings in the County Court of Collin County, Texas, seeking to condemn an easement across Smart's land for the construction of electric transmission lines to serve the public (R.,pp. 131-135 and 151). Special Commissioners were duly appointed and a hearing was had after which the Special Commissioners rendered an Award of $34,000.00 as the damages suffered by the landowners by reason of the condemnation (R., p.137). Respondent, on November 4, 1970, in accordance with the applicable statutory provisions, deposited the sum of $68,000.00 into the registry of the state court and executed the requisite bond taking possession of the easement being condemned (R.,pp. 143, 145 and 154). On May 13, 1971, Smart withdrew from the registry of the court the full amount of the Award of the Special Commissioners in the form of a check payable to Smart and the

other defendants-in-condemnation in the sum of $34,000.00 (R.,p. 154 and 152). The check has been cashed by Smart, et al (R.,p. 154).

The condemnation case was transferred from the County Court to the 199th Judicial District Court of Collin County, Texas by virtue of Art. 199a, Sec. 3.028, V.A.T.S. The condemnation proceedings are presently pending as Cause No. 71-159-199 in the 199th Judicial District Court (R.,pp. 152 and 154-155).

The Courts below did not reach the constitutional questions raised by Smart and did not pass upon those questions because Smart's withdrawal and acceptance of the Award of the Special Commissioners precludes Smart from challenging Respondent's right to condemn the subject easement and from contesting the jurisdiction of the condemnation court.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals correctly held that Smart is precluded from contesting Respondent's right to condemn and the jurisdiction of the condemnation court since Smart withdrew and accepted the Award made by the Special Commissioners.

The Texas law is most clear to the effect that, where the condemnee withdraws the Award of the Special Commissioners deposited in the registry of the condemnation court by the condemnor, the condemnee is precluded from thereafter contending that the condemnation was unlawful. The condemnee's acceptance of the Award constitutes a consent to the taking and to the jurisdiction of the condemnation court to award the

easement to the condemnor. In such a case, the only justiciable issue which remains is the issue of just compensation. *State v. Jackson,* 388 S.W.2d 924, 925-926 (Tex.1965); *City of San Antonio v. Grandjean,* 91 Tex. 430, 41 S.W. 477, 479 (1897); and *McConnico v. Texas Power & Light Company,* 335 S.W.2d 397, 399-400 (Tex.Civ.App. 1960, *error ref'd., n.r.e)*

Smart quarrels with the holding in *State v. Jackson* that awarded the condemnee only nominal damages for the 0.018 acres involved in that case. Smart, however, does not tell the Court why the condemnee was awarded only nominal damages. While that part of the holding is completely immaterial to the case at bar, the nominal damages were awarded since the condemnee "filed no answer and introduced no evidence as to the value of the 0.018 acre tract of land." The established rule, of course, is that the burden of proving the value of the land taken is on the condemnee. The Texas rule on the burden of proof is identical to the rule applicable in Federal condemnations. *United States ex rel. T.V.A. v. Powelson,* 319 U.S. 266, 273, 63 S.Ct. 1074, 87 L.Ed 1390, 1396-1397 (1943); *United States v. Certain Parcels of Land, Etc.,* 5 Cir., 149 F.2d 81, 82 (1945); *United States v. Smith,* 5 Cir., 355 F.2d 807, 809 (1966); and *United States v. 25.02 Acres of Land, Douglas County, Colo.,* 10 Cir., 495 F.2d 1398, 1400-1401 (1974). Thus, since the condemnee offered no evidence relating to value, the Court in *State v. Jackson* had no alternative but to assess nominal damages.

Smart also quarrels with the rule that the amount withdrawn by the condemnee is subject to partial divestiture where the fact-finder on the appeal from the Commissioners' Award fixes

just compensation at a figure less than that fixed by the Special Commissioners. This Honorable Court held that the same constitutional arguments advanced herein by Smart were "unsound" in *United States v. Miller*, 317 U.S. 369, 381-382, 63 S.Ct. 276, 87 L.Ed. 336, 346-347 (1943).

The Texas condemnation laws are plainly fair to the condemnee. Art. 3268, V.A.T.S., requires the condemnor to deposit double the Commissioners' Award and execute an appropriate bond insuring the ready availability of funds to satisfy the requirement of payment of just compensation before the condemnor takes possession of the land being condemned. The statute also provides that, in the event that it is ultimately adjudged that there was no right to condemn, the deposit stands as security for any and all damages suffered by the condemnee on account of the condemnor's temporary possession. Where it is found that the right to condemn exists or where the condemnee has withdrawn the Commissioners' Award, the condemnee is assured by the statute of receiving "just compensation." And, where such "just compensation" is ultimately determined to be more than the Commissioners' Award, the condemnee is additionally compensated by way of interest on the amount of the excess from the date that the condemnor takes possession. *Housing Authority of City of Dallas v. Shambry*, 252 S.W.2d 963, 966 (Tex.Civ.App.1952, *error ref'd, n.r.e.* at *Id.*, 152 Tex. 122, 255 S.W.2d 184, 185). The Texas rule pertaining to payment of interest is precisely the rule applicable in Federal condemnations. *United States v. Dow*, 357 U.S. 17, 22, 78 S.Ct. 1039, 2 L.Ed.2d 1109, 1114 (1958). Where, however, the "just compensation" is ultimately fixed at

a sum less than the Commissioners' Award, the condemnee (even though he has withdrawn the full amount of the Commissioners' Award) is merely obligated to return the excess he has previously received; he is not obligated to pay interest on such excess. *Maddox v. Gulf, Colorado & Santa Fe Railroad Co.*, 293 S.W.2d 499, 507 (Tex.Civ.App. 1956, *error ref'd., n.r.e.)* and *Gossett v. State*, 417 S.W.2d 730, 737 (Tex.Civ.App. 1967, *error ref'd., n.r.e.)*

The Texas rule, that the condemnee's withdrawal and acceptance of the Commissioners' Award precludes the condemnee from thereafter claiming that the condemnation is unlawful, is, certainly, constitutionally permissible. Such a rule was expressly approved in *Winslow v. Baltimore & O.R. Co.*, 208 U.S. 59, 62, 28 S.Ct. 190, 52 L.Ed. 388, 390 (1908). See also *Robnison v. Transcontinental Gas Pipe Line Corporation* (D.C.Ga. 1969) 306 F.Supp. 201, 208, aff'd at *Id.*, 5 Cir., 421 F.2d 1397 (1970) cert.den. 398 U.S. 905, and compare *United States v. Certain Parcels of Land, Etc.* (D.C.Ohio 1957) 149 F.Supp. 696, 700.

Smart's withdrawal and acceptance of the Commissioners' Award precludes him from challenging Respondent's right to condemn the subject easement. Smart's withdrawal constitutes a consent to the right to condemn and to the jurisdiction of the state court to award the easement to Respondent upon payment of full "just compensation" as ultimately determined on Smart's appeal to the 199th Judicial District Court of Collin County, Texas. The only justiciable issue now remaining between the parties is the issue of "just compensation."

The courts below were eminently correct in dismissing Smart's suit because of his withdrawal and acceptance of the $34,000.00 Commissioners' Award on May 13, 1971 — some fifteen months before he filed this action in Federal Court. The law is settled and just. The constitutionality of such law is beyond reproach. The Writ should be denied.

II.

The dismissal of Smart's suit is additionally correct under the doctrine of laches since Smart waited almost two years since the institution of the condemnation proceedings before filing the present action, the transmission lines having long since been constructed across the subject easement.

The condemnation proceedings were instituted in state court on September 1, 1970 (R., pp. 131-135 and 151). Not only did Smart withdraw and accept the Commissioners' Award but he also permitted the construction of the transmission lines on the easement without taking any action challenging Respondent's right to condemn the easement until he filed the present action on August 25, 1972 (R.,pp. 151-152). If ever the doctrine of laches were applicable, that doctrine is applicable in the case at bar. Precisely in point is *Robinson v. Transcontinental Gas Pipe Line Corporation* (D.C.Ga. 1969) 306 F.Supp. 201, 208, aff'd, *Id.*, 5 Cir., 421 F.2d 1397 (1970) cert.den. 398 U.S. 905.

The law is well-established that a condemnee cannot sit idly by and suffer the condemnor to make valuable improvements on the land and then attempt to oust the condemnor; the condemnee is, in such a case, relegated to his recovery of damages. *Northern Pacific Railroad Co. v. Smith,* 171 U.S. 260, 271-

275, 18 S.Ct. 794, 43 L.Ed. 157, 161-163 (1898); *Lacy v. United States,* 5 Cir., 216 F.2d 223, 225 (1954); and *Dickinson v. Brown-Crummer Inv. Co.,* 10 Cir., 137 F.2d 615, 618 (1943).

The transmission lines have long since been built on the easement through Smart's land. Smart waited almost two years from the time of the institution of the condemnation proceedings before filing the instant action. Smart withdrew and accepted the Commissioners' Award over fifteen months before filing the instant action. Laches provides yet another reason for the denial of the Writ.

III.

Smart's contention with respect to interest affords him no right of relief in this action.

Smart's contention that the Texas condemnation laws are invalid because of no provision for payment of interest is not only unsound but it is an argument which Smart has no standing to make in this action. Since Smart withdrew and accepted the Commissioners' Award, he is precluded from challenging the lawfulness of the condemnation as established in section I, *supra.* The withdrawal and acceptance of the Commissioners' Award, moreover, certainly precludes Smart from complaining of the lack of any interest on the amount of the Award. Smart has the money — and has had it for five years—to invest and reinvest as he pleases. The deposit was made prior to Respondent taking possession; indeed, it is a condition precedent to taking possession.

Where there is a taking without a deposit (inverse condemnation), the condemnee is entitled to interest from the date of

taking. *Brunson v. State*, 444 S.W.2d 598, 602 (Tex. 1969). Where, as here, a deposit is made — there are two possibilities under Art. 3268, V.A.T.S., *viz.* (1) Where it is ultimately found that no right to condemn exists, the deposit stands as security for the payment to the condemnee of all damages occasioned by the condemnor's temporary possession of the property, and (2) Where it is ultimately found that there is a right to condemn, the deposit is considered a tender to the condemnee and, certainly, no interest is due on sums deposited for the account of the condemnee which he can withdraw and use at his pleasure. *Housing Authority of City of Dallas v. Shambry*, 252 S.W.2d 963, 966 (Tex.Civ.App.1952, *error ref'd., n.r.e.* at *Id.*, 152 Tex. 122, 255 S.W.2d 184, 185) and *Fort Worth Concrete Co. v. State*, 400 S.W.2d 314, 317 (Tex. 1966). And, as previously established in section I, *supra*, the condemnee is entitled to recover interest on any excess in the event that his "just compensation" is ultimately fixed in an amount greater than the Commissioners' Award. See also *Trinity River Auth. of Tex. v. Sealy & Smith Found.*, 435 S.W.2d 864, 865 (Tex. 1968). As held in *United States v. Miller*, 317 U.S. 369, 382, 63 S.Ct. 276, 87 L.Ed. 336, 347 (1943), the deposit is a "provisional and not a final settlement with the owner; it is a payment 'on account of' compensation and not a final settlement of the amount due." In short, the deposit is not unlike a down-payment with any balance due (after the final determination of "just compensation") being payable with interest.

Smart's attempt to both have his cake and eat it too affords absolutely no reason for granting the Writ.

IV.

The condemnation proceedings presently pending in state court were validly instituted.

On pages 8-9 of his Petition, Smart claims that two fatal deficiencies exist in the presently pending condemnation proceedings. Each of these claims is false and not supported in the record.

Again, Smart goes outside the record in this case when he speaks of his brother, Scott Smart. Again, Scott Smart's name was not even mentioned in Smart's briefs and motions filed in the Court of Appeals. If the case cited by Smart, *Dr. Scott Smart v. Texas Power & Light Company*, 5 Cir., 525 F.2d 1211, 1212 (1976), is *res adjudicata* on anything, it is *res adjudicata* on the point that Dr. Scott Smart's interest in the subject tract was not a matter of record until two and one-half years after the institution of the condemnation proceedings and that Respondent did not have knowledge of Scott Smart's alleged interest until his deed was recorded.

The second contention to the effect that Respondent did not have proper corporate authorization for the condemnation is in the face of the uncontroverted facts in this record (See, *e.g.*, Deposition of T. L. Austin, Jr., pp. 11-12, 15, 25-26, 62-68, and R., pp. 223-229).

Thus, it is seen that Smart's contentions are false and in the face of the record in this case. Of course, these contentions do not even purport to present a Federal question but instead present questions peculiar to state law which are more properly to be decided by the state condemnation court. Moreover, by

withdrawing and accepting the Commissioners' Award, Smart has consented to Respondent's right to condemn the subject easement as established in section I, *supra*. Again, no reason exists for granting a Writ.

V.

Even if Smart were permitted to challenge the Texas condemnation laws, still the Federal Courts should abstain under the principles of equity, comity, and federalism since the condemnation proceedings are presently pending in the state court which is an entirely competent tribunal firmly bound to the Constitution.

Judges of the state courts are firmly bound to the Constitution, laws and treaties of the United States. Art. VI, Clause 3, U.S. Constitution. Of course, there is always the ultimate right of appeal to this Honorable Court from the state courts. The absention doctrine, based upon the principles of equity, comity, and federalism, is clearly applicable under the clear guidelines of *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) and *Younger v. Harris*, 401 U.S. 37, 49, 91 S.Ct. 746, 27 L.Ed.2d 669, 678-679 (1971). Indeed, the absention doctrine has been repeatedly applied to suits challenging state condemnation proceedings. *Martin v. Creasy*, 360 U.S. 219, 79 S.Ct. 1034, 3 L.Ed.2d 1186 (1959); *Cavanaugh v. Looney*, 248 U.S. 453, 39 S.Ct. 142, 63 LEd 354 (1919); *Baber v Texas Utilities Co.*, 5 Cir., 228 F.2d 665, 666 (1956); *Lewis v. Texas Power & Light Company*, 5 Cir., 462 F.2d 1318, 1319 (1972); and *Hill v. Victoria County Drainage District No. 3*, 5 Cir., 441 F.2d 416 (1971).

The Writ should be denied, additionally, under the established absention doctrine "since interference with a state judicial

proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies." *Huffman v. Pursue, Ltd., supra.*

VI.

Even if Smart were permitted to challenge the Texas condemnation laws, it is clear that said laws meet the tests of due process.

There can be no doubt but that Respondent's condemnation is for a public purpose and that Respondent, a public utility company enjoined by state statute to provide service to the public on a non-discriminatory basis, has been validly delegated the power of eminent domain. Arts. 1435, 1436 and 1438, V.A.T.S. and *Arcola Sugar Mills Co. v. Houston Lighting & Power Co.*, 153 S.W.2d 628, 633 (Tex.Civ.App.1941, *error ref'd, W.M.).* Perhaps, the necessity for, and propriety of, the delegation of such power to public utilities has never been more eloquently stated than by Mr. Justice Holmes in *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507, 511 (1916). See also *The Mississippi and Rum River Boom Company v. Patterson*, 98 U.S. 403, 25 L.Ed. 206, 207-208 (1879). The payment of "just compensation" is assured by the Texas statutes, the Texas Constitution (Art. I, Sec. 17) and by the Texas case law as established in sections I and III, *supra,* as well as by the Fifth Amendment to the United States Constitution. Substantive due process, therefore, is assured.

Procedural due process is similarly assured. The Texas laws provide for due notice and a meaningful and timely hearing on all questions the condemnee may want to litigate. In view of Smart's contention in this case, however, it should be pointed out that, since the power of eminent domain is a basic attribute of sovereignty and a necessary governmental power vested in the states for the common good [*Louisiana Power & Light Co. v. Thibodeaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959) and *Green Street Association v. Daley*, 7 Cir., 371 F.2d 1 (1967) cert. den. 389 U.S. 849], there is no constitutional requirement for the condemnee to be heard on the question of the necessity of the taking prior to institution of the condemnation proceedings or the taking of possession under the required statutory deposit and bond. *Georgia v. Chattanooga*, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796 (1924); *Bragg v. Weaver*, 251 U.S. 57, 40 S.Ct. 62, 64 LEd 135 (1919); *Joslin Mfg Co. v. Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed 1167 (1923); *North Laramie Land Co v. Hoffman*, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925); *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893); *Louisville and Nashville Railroad Company v. Western Union Telegraph Company*, 250 U.S. 363, 39 S.Ct. 513, 63 L.Ed. 1032 (1919); *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299, 74 LEd. 904 (1930); *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *2,953.15 Acres of Land v. United States*, 5 Cir., 350 F.2d 356 (1965); and *Joiner v. City of Dallas* (D.C.Tex.1974) 380 F.Supp. 754, 764-779, aff'd. at *Id.*, 419 U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974) reh. den. 419 U.S. 1132.

Not only under the above authorities does the appeal from the Commissioners' Award itself provide the condemnee with a meaningful and timely hearing, but Texas law provides the condemnee with several other procedures and remedies for testing the condemnee's right to take. For example, an injunction suit may be prosecuted if the condemnation proceedings are void [*Lone Star Gas Co. v. City of Fort Worth,* 128 Tex. 392, 98 S.W. 2d 799 (1936) and *Dallas County v. Plowman,* 99 Tex. 509, 91 S.W. 221 (1906)], where the condemnor's act is illegal [*Bowers v. City of Taylor,* 16 S.W.2d 520 (Tex.Com. App.1929) and *Floyd v. Turner,* 23 Tex. 592 (1859], where the condemnor has appropriated land other than that described in the condemnation decree [*San Antonio v. Sullivan,* 57 S.W. 45 (Tex.Civ.App.1900, *error ref'd.*); *Fort Worth & R.G.R. Co. v. Jennings,* 76 Tex. 373, 13 S.W. 270 (1890); and *Stone v. Wylie,* 34 S.W.2d 842 (Tex.Com.App.1931)], or where the land has been appropriated without payment therefor [*McCammon & Lang Lumber Co. v. Trinity & B.V. Ry. Co.,* 104 Tex. 8, 133 S.W. 247 (1911); *West Texas Utilities v. Lee,* 26 S.W.2d 457 (Tex.Civ.App.1930, n.w.h.); *Koslosky v. Texas Electric Service Co.,* 213 S.W.2d 853 (Tex.Civ.App.1948, *error ref'd.);* and *Scott v. City of Robinson,* 404 S.W.2d 330 (Tex.Civ.App. 1966, *error ref'd., n.r.e)*]. Additionally, the condemnee can test his contention that the condemnor is proceeding under an unconstitutional statute in a trespass to try title action. *Buffalo Bayou, etc. Railroad Co. v. Ferris,* 26 Tex. 588 (1863).

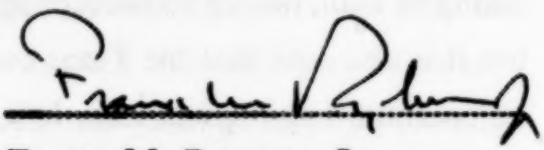
Thus, it is clear, from a legion of cases, that Smart's due process argument is specious. Not only does Smart not have the right to make the argument in view of his consent to the taking by withdrawing and accepting the Commissioners' Award, but it is also seen that the Texas condemnation laws fully meet all constitutional requirements. It is, therefore, respectfully submitted that the Writ must be denied for this additional reason.

CONCLUSION

There is absolutely no merit to Petitioner's Petition for Writ of Certiorari — no more merit than was found in the long line of frivolous cases and appeals dating back to the 1950's brought by Petitioner and/or his attorney outlined in the Preface, *supra*. Having taken the benefits of the condemnation by withdrawing and accepting the Commissioners' Award, Smart can neither challenge Respondent's right to condemn the subject easement nor can he attack the jurisdiction of the state condemnation court to award the easement to Respondent upon the payment of "just compensation." The doctrine of laches provides yet another ground precluding Smart from attempting to oust Respondent whom Smart suffered to make valuable improvements to the easement. If, however, Smart had not taken advantage of the provisions of the Texas condemnation laws, his contentions can only be characterized as specious since the condemnation proceedings in question were validly instituted under laws which meet and satisfy every constitutional requirement. The judgments below are correct and just.

WHEREFORE, **Respondent prays this Honorable Court to DENY a Writ of Certiorari in this case.**

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Frank M. Ryburn, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing "Respondent Texas Power & Light Company's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" by mailing three copies of same by United States mail, postage prepaid, on June 17, 1976, to each: Mr. S. L. Lewis, 5614 Richmond Street, Dallas, Texas 75206, counsel of record for Petitioner; Dr. Don M. Smart, 10611 Garland Road, Dallas, Texas 75218, Pro Se; and Mr. David R. Thomas, Assistant Attorney General of Texas, 2930 Turtle Creek Plaza, Suite 114, Dallas, Texas 75219, counsel of record for Respondents Hon. Dolph Briscoe and Hon. John Hill.

Frank M. Ryburn, Jr.